

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Reexamination of Roaming Obligations of) WT Docket No. 05-265
Commercial Mobile Radio Service Providers)
_____)

SPRINT NEXTEL REPLY COMMENTS

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Summary

For more than a decade, the Commission has generally adhered to a policy reliant on market forces for the commercial mobile radio services sector. This policy has been successful. However, several small and mid-sized carriers now ask the Commission to reverse course. In effect, these parties urge the Commission to force competitive wireless carriers to share their networks and provide service to competitors at prescribed rates. Such a course would undermine further coverage buildout, cause customer dissatisfaction, stifle innovation and lead to increased consumer prices.

The ramifications of this proceeding go beyond roaming and directly affect the future direction and development of the wireless industry – impacting carrier coverage, consumer prices and other important competitive variables. At issue is whether the Commission should intervene in the competitive CMRS market to “equalize competition” by eliminating current product and price differentiations that have benefited consumers.

There is no record evidence demonstrating market failure supporting such intervention. As documented in Sprint Nextel’s comments and in the economic analysis provided by Dr. Rosston, consumers, including those in rural areas, benefit enormously by the operation of competitive market forces in this area. Consumers are required to roam less often, and when they do roam on other networks, they are paying lower prices than ever before. Clearly, coverage and lower prices promote the public interest.

In fact, the harm rule proponents allege is harm to their corporate welfare, not to consumers. The harmful impacts of the regulatory approach favored by some are most graphically illustrated by Southern’s “lowest prevailing retail rate” price cap proposal. Based on Sprint Nextel calculations, according to Southern, carriers should be required to offer competitors access to their facilities-based networks at approximately one-half penny (\$0.006) per minute during business days/hours and *free* during weekends and nights. This is clearly uneconomic. Taken to its logical extreme, why would any carrier build facilities to expand or improve coverage if it could instead gain access to its competitors’ networks at prices ranging from zero to \$0.006 per minute?

Treating different carriers differently is not unlawful under Section 202(a) of the Communications Act. The statute does not prevent disparities in prices for similar services, but only unreasonable differences.

In addition, there is no basis to adopt new rules for special applications (iDEN dispatch and data networks) or for particular bands (the 2.5 GHz BRS/EBS band).

Sprint Nextel also attaches an additional economic analysis by Dr. Rosston, rebutting the economic analysis provided by rule proponents.

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Sprint Nextel Corporation (“Sprint Nextel”) hereby replies to the comments submitted in response to the above-referenced *Notice of Proposed Rulemaking*.¹

I. INTRODUCTION

This proceeding will directly impact the future direction and development of the competitive wireless industry. At issue is whether the Commission should mandate intercarrier roaming arrangements in the absence of market failure in ways that would negatively impact facilities buildout, innovation and competitive pricing.

For more than a decade, the Commission has generally relied on market forces for the commercial mobile radio services (“CMRS”) sector. This policy has been successful, with Chairman Martin stating that the CMRS sector has become “the poster child for competition.”²

¹ Sprint Nextel appends to this reply an additional economic analysis prepared by Dr. Gregory Rosston. This paper responds to the two other economic papers that have been submitted in the record to date: one by Dr. R. Preston McAfee for SouthernLINC (“Southern”), and the other by the ERS Group for Leap Wireless (“Leap”). Sprint Nextel does not discuss manual roaming in this reply, and its references to roaming herein refer to automatic roaming only, unless noted otherwise.

² See Presentation of Commissioner Kevin J. Martin, *Wireless and Broadband: Trends and Challenges*, Dow Lohnes-Comm Daily Speaker Series, at 2 (Oct. 15, 2004).

Indeed, as the Commission stated recently, “U.S. consumers continue to benefit from robust competition in the CMRS marketplace”:

Consumers continue to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service. * * * [M]obile telephone providers continued to build out their networks and expand service availability in 2004. * * * In addition to investing in network deployment and upgrades, carriers have continued to pursue strategies designed to differentiate their brands from rival offerings based on attributes such as network coverage and service quality.³

Several small and mid-sized carriers now ask the Commission to reverse course radically. More specifically, these parties urge the Commission to force competitive wireless carriers to share their networks (akin to prior ILEC UNE obligations), to begin regulating CMRS rates (akin to “price caps”), to require tariffs (*via* publication of roaming contracts), and to change the enforcement process (with new evidentiary presumptions designed to meet particular business plans).⁴

Rule proponents claim a “market failure.” Yet, there is no record evidence demonstrating such failure. To the contrary, Sprint Nextel submitted comments, including an economic analysis by Dr. Rosston, documenting that consumers, including in rural areas, continue to benefit enormously by the operation of market forces. Due to continued network buildout, consumers are required to roam less often. And when they do roam on other networks, they are paying

³ *Tenth Annual CMRS Competition Report*, 20 FCC Rcd 15908 at ¶¶ 3, 4, 204, 205 (2005).

⁴ Rule proponents rely upon Section 201(a) of the Communications Act as the basis for an automatic roaming rule. In fact, Section 201(a) addresses physical connections between carriers to enable call completion. Two carriers do not execute a roaming agreement in order to establish “physical connections with other carriers” or to establish a “through route” to complete calls originating on the other’s network. The network of the “roaming” customer need not be physically interconnected to the carrier providing service to its customer. Indeed, the call path may never touch the network of the “home” carrier.

lower prices than ever before. Better coverage and lower prices promote the public interest – they are not “market failures.”

Instead, the concerns expressed by rule proponents are actually about their corporate welfare. At core, rule proponents claim harm because certain competitors have taken the business risk of building larger networks and can thereby offer their customers better network coverage. MetroPCS, for example, complains that as its competitors continue their network buildout, those carriers have less of an incentive to assist “head-to-head” competitors like MetroPCS.⁵ Remarkably, MetroPCS goes so far as to blame the FCC for this clearly beneficial network buildout.⁶ The consuming public benefits from such competition which encourages investment, innovation and competitive prices.

Southern argues for a “lowest prevailing retail rate” price cap. According to Southern, carriers like Sprint Nextel should be required to offer competitors access to its network at approximately one-half penny (\$0.006) per minute during business days/hours and *free* during nights and weekends. This is hardly a credible proposal and is clearly uneconomic. Under Southern’s proposal, incentives for additional investment and additional facilities-based competition would be diminished significantly. Indeed, under Southern’s proposal, carriers would also lose the incentive to lower their retail prices further because such action would result in their competitors getting even cheaper access to their networks.

⁵ “At that point, the incentive to compete outweighs the incentive to cooperate.” MetroPCS Comments at 8.

⁶ *See id.* (“By allowing the large carriers to . . . expand their geographic reach, the Commission has reduced their incentive to enter into reciprocal roaming arrangements.”).

Sprint Nextel urges the Commission to reaffirm its continuing commitment to rely on market forces rather than regulation.⁷ Commission affirmation would encourage all service providers to continue to invest and innovate to the benefit of customers.

II. THERE HAS BEEN NO DEMONSTRATION OF MARKET FAILURE JUSTIFYING THE IMPOSITION OF NEW RULES

The Commission has recognized it should not adopt any automatic roaming rules “unless it is clear that providers' current practices are unreasonably hindering the operation of the market to the detriment of consumers”:

Only where market forces alone are not sufficient to ensure the widespread availability of competitive roaming services, and where roaming is technically feasible without imposing unreasonable costs on CMRS providers, do we believe it may be in the public interest to impose a roaming requirement that will facilitate the widespread availability of roaming and promote competition in wireless services.⁸

The comments filed in this proceeding confirm that there is no market failure concerning access to roaming services and that consumers continue to benefit from the Commission’s reliance on market forces. In fact, the record evidence suggests that consumers would instead be affirmatively harmed if the Commission replaced market forces with new government regulation.

A. THE HARM RULE PROPONENTS ALLEGE IS ACTUALLY HARM TO THEIR INDIVIDUAL CORPORATE INTERESTS, NOT TO CONSUMERS OR THE PUBLIC INTEREST

The Commission stated in its NPRM that it is “interested in the effects that the existing roaming environment has on U.S. consumers,” and it specifically invited parties to submit economic analysis and data regarding the impact of existing market conditions “on consumers.”⁹ As

⁷ See *Second CMRS Order*, 9 FCC Rcd 1411, 1420 ¶ 9 (1994).

⁸ *2000 Roaming NPRM*, 15 FCC Rcd 21628, 21635 ¶¶ 16, 18 (2000). See also *2005 Roaming NPRM* at ¶ 25.

⁹ See *2005 Roaming NPRM* at ¶¶ 27 and 41.

Commissioner Capps also stated in his separate statement: “we should stay focused on the interests of consumers.”

Rule proponents do not discuss consumer welfare for obvious reasons – customers benefit when they avoid paying separate roaming charges altogether. Sprint Nextel documented in its comments that market forces are meeting this consumer interest through enhanced coverage and lower roaming rates.¹⁰

Commissioner Capps has asked about consumer welfare in rural areas. Notably, Sprint Nextel has acquired (or is in the process of acquiring) several of its affiliates that serve rural areas, and residents of these areas will, to the extent they do not already, have access to the same national plans that Sprint Nextel provides to consumers in metropolitan areas.¹¹ In such rural areas, Sprint Nextel will continue to enhance its network and work to provide rural customers with the same features and services available to consumers in more urban markets. Also towards this end, Sprint Nextel is executing strategic roaming agreements (“SRA”) with firms (often rural LECs) that are building advanced CDMA networks in very rural areas of the country, and these SRA partners are beginning to offer their rural residents similar national coverage plans at very competitive prices.¹²

¹⁰ See Sprint Nextel Comments at 3-5. For example, under Sprint Nextel’s current Fair & FlexibleSM plan, customers do not pay any extra charges when they travel throughout the country, whether this travel is “on-net” or “off-net.”

¹¹ Sprint Nextel herein uses the term “affiliates” to apply to both business partners operating under Sprint’s licenses (*e.g.*, Alamosa) as well as entities operating under their own licenses (*e.g.*, Nextel Partners).

¹² See Sprint Nextel Comments at 6-9. For example, Nex-Tech Wireless, a new extant carrier serving portions of Colorado and Kansas (with an average population density of less than seven persons per square mile), offers consumers in its rural service area national coverage without separate roaming charges. Other Sprint Nextel SRA partners also offer consumers in their rural area national coverage without separate roaming charges.

Again, the harm rule proponents allege is not harm to *consumers*, but harm to their own business interests. For example:

- Leap complains that large carrier practices require it to charge “higher roaming prices” than it would prefer.¹³
- Leap’s economists state that large carrier practices “restrict the ability of regional carriers to compete effectively with respect to consumer segments for which nationwide coverage is a significant factor.”¹⁴
- Southern claims it is at “a competitive disadvantage” because it does not offer the same national coverage as other carriers.¹⁵
- Southern’s economist states that regional carriers like Southern “would benefit” by new rules because, due to their “limited footprint,” a regional operator otherwise “is unlikely to attract customers who roam a great deal.”¹⁶

These allegations of harm all stem from consumers having a variety of competitive choices.

Nevertheless, allegations of harm to individual competitors are far-removed from the consumer welfare this Commission seeks to promote. The Commission has held repeatedly that it is “not at liberty to subordinate the public interest to the interest of equalizing competition among competitors,”¹⁷ and that its “statutory duty is to protect efficient competition, not competitors.”¹⁸

Thus, the Commission may not, as a matter of law, take steps so certain carriers with smaller network footprints can offer the same coverage as national carriers, much less compel competitors to assist each other by requiring access to facilities at uneconomic rates.

¹³ Leap Comments at 16.

¹⁴ ERS Group Paper at 17.

¹⁵ SouthernLINC Comments at 14.

¹⁶ McAfee Paper at 13 and 16.

¹⁷ *800 MHz Rebanding Reconsideration Order*, WT Docket No. 02-55, FCC 05-174, at ¶ 73 (Oct. 5, 2005), quoting *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). See also Sprint Nextel Comments at 16 n.65.

¹⁸ See Sprint Nextel Comments at 16 nn. 63 and 64.

The claim of competitor harm from the operation of market forces is not wholly credible. MetroPCS, for example, claims to be “one of the fastest growing wireless services providers in the nation” and the second largest carrier in Miami despite entering that market late.¹⁹ Remarkably, although claiming to serve more customers in Miami than Sprint Nextel, MetroPCS nonetheless expects Sprint Nextel to provide access to its network at preferred rates.

The comments make apparent that the real issue is not the availability of intercarrier roaming services.²⁰ The real complaint of the rule proponents is not that they cannot negotiate roaming agreements, but rather that they would prefer to pay below-market prices for accessing their competitors’ networks. In other words, the rule proponents want the Commission to regulate prices. This desire for profit maximization does not mean there exists a “market failure.” And the rule proponents do not explain why they should receive below-market prices for access to their competitors’ networks.²¹

Finally, rule proponents and their economists accuse the national carriers of acting “anti-competitively,” “obstructing competition,” “foreclosing entry,” and imposing “anticompetitive barriers to entry.”²² One does not “obstruct competition” or “foreclose entry” by failing to af-

¹⁹ See MetroPCS Comments at 2, 3 and 28.

²⁰ Indeed, the comments identify only one carrier that has been unable to obtain a roaming agreement with another carrier – but the reason it does not have an agreement is because it made the business judgment not to proceed. Southern complains that it does not have a roaming agreement with Nextel Partners, which Sprint Nextel recently agreed to acquire. However, Southern acknowledges that it was Nextel Partners that “approached SouthernLINC Wireless about the possibility of entering into a reciprocal roaming arrangement,” but that the parties were unable to reach agreement because Southern believed that the proposed prices were “excessive.” Southern Comments, Attachment A at 13.

²¹ See McAfee Paper at 12 (“A regional carrier has little bargaining power, since the value of roaming on the nationwide carrier’s subscribers is modest.”).

²² See, e.g., McAfee Paper at 1, 3, 4, 5, 6, 12, 13, 14 and 16; ERS Group Paper at 2, 3 and 14.

firmatively assist one's competitors. Decisions not to build in other markets (*e.g.*, acquire additional spectrum) – whether based on financial considerations or other factors²³ – is not the fault of larger carriers. Notably, some carriers such as Leap have elected to sell spectrum they previously acquired rather than expand the scope of their own networks.²⁴

Consumers who seek something more or different can choose from a wide array of competitive providers – including the major carriers, MVNOs, and new entrant rural carriers that are building advanced networks and offering national, no-roaming plans. These competitive choices serve the public interest.

B. CONSUMER WELFARE, INCLUDING THE WELFARE OF RURAL CONSUMERS, WOULD BE AFFIRMATIVELY HARMED BY THE RULES BEING PROPOSED

Consumers would be affirmatively harmed by the rule proposals. For example, Southern proposes a “price cap” regime, whereby licensees would be forced to offer their competitors access to their networks at their “lowest prevailing retail rate.”²⁵ But based on Sprint Nextel calculations, under the Southern proposal the following should be considered:

²³ For example, Southern's decision not to acquire additional spectrum outside its four-state area does not appear to be due to financial constraints. *See, e.g.*, <http://investor.southerncompany.com/about/classic.cfm> (Southern enjoyed profits of \$1.47 billion in 2003). Similarly, MetroPCS recently received a capital infusion of \$739 million – \$50 million of which it will use to build networks in Dallas and Detroit. *See* CRAIN'S DETROIT BUSINESS, *New Wireless Service to Debut in 2006; 2 Firms Invest \$739M in MetroPCS*, at 1 (Oct. 10, 2005). MetroPCS can solely determine where and how to make investments, but it should not complain about a lack of network coverage when it uses less than 7% of new investment money in network buildout.

²⁴ Alternatively, carriers with smaller networks can, as Leap has done, form roaming consortia/joint ventures with other small and regional carriers or sell dual-mode handsets so as to increase the number of potential roaming partners. *See, e.g.*, RCR WIRELESS NEWS, *Leap, Revol Clump Markets*, at 14 (Nov. 14, 2005). The fact that smaller carriers may not prefer these alternatives is not a reason for the FCC to conclude there exists a “market failure.”

²⁵ *See* Southern Comments at 35 and 49; McAfee Paper at 5 and 16. Leap, in contrast, proposes use of average revenue per retail minute, although it too would use the lowest retail price if average revenue data is not available. *See* Leap Comments at 19; EGS Group Paper at 17-18.

- Southern offers a plan, Talk It Up Unlimited, with unlimited minutes (including free long distance) for \$169.99 monthly.²⁶ There are 43,200 minutes in a month (60 minutes/hour x 24 hours x 30 days). Under its proposal, Southern apparently would be required to offer its competitors access to its network at a price of less than one half penny (\$0.004) per minute. It is unclear from Southern's proposal whether this very low price would include free long distance as well.
- Leap offers a plan, Unlimited Classic, with unlimited voice minutes for \$35 monthly (\$40 with free long distance).²⁷ Under Southern's proposal, Leap apparently would be required to offer its competitors access to its network at a price of less than one tenth of one penny (\$0.0008) per minute.
- Leap offers another plan, Unlimited Access, with unlimited voice and data minutes for \$45 monthly.²⁸ Under Southern's proposal, Leap apparently would be required to offer its competitors *free* access to its network because the amount of data that can be transmitted during 43,200/minutes a month is virtually unlimited.
- Sprint Nextel, under its Fair & FlexibleSM plan, offers for \$99.99 2000 any-time minutes (7 a.m. to 9 p.m.), which includes free long distance and unlimited minutes during nights and weekends.²⁹ Under Southern's proposal, Sprint Nextel apparently would be required to offer its competitors access to its CDMA network at a price of one half of one penny (\$0.006) per minute during business days/hours and for *free* during nights and weekends.

In sum, incentives for additional investment and additional facilities-based competition would be distorted. Moreover, if Southern's plan was adopted, carriers would lose the incentive to lower retail prices because such action would actually result in their competitors getting even cheaper access to their networks. Such regulation is clearly bad for consumers and competition.

Consumers in rural areas would be especially harmed by the rule proposals. For example, as explained in its comments, Sprint Nextel is building out its network extensively in urban, suburban and rural areas. Sprint Nextel is also working with small businesses (often rural LECs)

²⁶ See https://onlinestore.southernlinc.com/storefront/service_plans.asp (visited Jan. 11, 2006).

²⁷ See <http://www.mycricket.com/servicepricing> (visited Jan. 11, 2006).

²⁸ See *id.*

²⁹ See <http://www1.sprintpcs.com/explore/servicePlansOptionsV2/> (visited Jan. 11, 2006).

to build advanced CDMA networks in rural areas to provide new competitive alternatives to residents of these rural areas. These SRA partners are offering rural consumers, among other things, text and multimedia messaging, high-speed Internet access, and national coverage plans with no separate roaming charges. The business plans of these SRA partners are built on the assumption they will have access to Sprint Nextel's nationwide network at certain prices that give the SRA partner a competitive advantage in competing against the rural incumbent carriers. Yet, under the "most favored nation" proposal made by the Rural Telecommunications Group ("RTG"), rural incumbents would have access to the same prices that SRA partners negotiate. Why would any other small business consider investing in new advanced networks in other rural areas if incumbents are entitled to receive the same benefits Sprint Nextel offers to the new entrant. Again, the rules favored by some would thus undermine rural buildout incentives which benefit consumers.

III. TREATING CARRIERS DIFFERENTLY IS NOT UNLAWFUL

Rule proponents, claiming large carriers discriminate against them, urge the Commission to adopt rules to prohibit such discrimination. MetroPCS, for example, asks that large carriers be "prohibited from providing more favorable roaming agreements to themselves and to their affiliates than to unaffiliated third parties."³⁰ RTG wants the Commission to give small carriers the right to opt-into any agreement a large carrier has with its "most favored" roaming partners."³¹

The Commission must dismiss these claims as a matter of law. Section 202(a) of the Act permits reasonable discrimination and the RTG proposal would violate this core distinction.

³⁰ MetroPCS Comments at iii. MetroPCS does not explain how a carrier "roams" with itself.

³¹ RTG Comments at 4 and 14.

A. SECTION 202(a) DOES NOT PROHIBIT ALL DISCRIMINATION

Treating different carriers differently is not, as some suggest, unlawful under Section 202(a) of the Communications Act. This statute, courts have held, does “not prevent all discrimination – disparities in prices for similar service – but only *unreasonable discrimination*.”³² Specifically, Section 202(a) provides unequivocally that only “*unjust or unreasonable discrimination*” in charges, practices, or classifications is unlawful.³³

Discrimination is not unreasonable if there is a “neutral, rational basis underlying the apparently disparate charges.”³⁴ Thus, if a carrier has a “rational basis” for treating another carrier differently, there is no obligation to offer to that carrier the same terms contained in an agreement with a third carrier because the resulting “discrimination” will not be deemed unreasonable.³⁵

³² *NARUC v. FCC*, 737 F.3d 1095, 1036 (D.C. Cir. 1984)(emphasis in original). *See also Verizon Wireless Priority Access Service Waiver Order*, 20 FCC Rcd 13603 ¶ 14 (2005) (“Section 202 does not prevent carriers from treating users differently; it bars only unjust or unreasonable discrimination.”); *Connecticut Gross Receipts Surcharge Order*, 4 FCC Rcd 8130, 8132 ¶ 12 (1989)(“[T]he Communications Act does not bar all rate discrimination, only ‘unjust or unreasonable’ discrimination.”).

³³ 47 U.S.C. § 202(a)(emphasis added).

³⁴ *AT&T v. FCC*, 832 F.2d 1285, 1293 (D.C. Cir. 1987). *See also Priority Access Services*, 15 FCC Rcd 16720, 16730 ¶ 23 (2000)(“Carriers may differentiate among users so long as there is a valid reason for doing do.”).

³⁵ For example, roaming contracts may include volume or term commitments/discounts, and the FCC has long recognized that such arrangements are pro-competitive and not unreasonably discriminatory. *See, e.g., 1998 Biennial Regulatory Review*, 15 FCC Rcd 20703, 20712 ¶ 20 (1999) (“[T]he Commission has found term and volume discounts not to be *per se* discriminatory and that they can have a beneficial effect on competition.”); *PCIA Forbearance Petition Order*, 13 FCC Rcd 16857, 16871 ¶ 29 (1997)(“[T]here is a substantial body of precedent that promotional programs, volumes discounts and other arrangements may be reasonable and non-discriminatory.”); *Computer II Waiver Order*, 100 F.C.C. 2d 1057, 1106 n.86 (1987)(“[F]lexibility in the pricing of private line services such as nondiscriminatory bulk discount offerings is desirable.”).

In addition, to even state a discrimination claim under Section 202(a), the complaining carrier must, at minimum, demonstrate that it is similarly situated to the carrier with the agreement that it wants to opt into. “Similarly situated” means “directly comparable . . . in all material respects.”³⁶ The Commission has recognized that two carriers are not similarly situated if each provides different benefits to a third carrier.³⁷

MetroPCS is therefore wrong in arguing that a large carrier “must provide roaming services to a requesting carrier at rate, and on terms and conditions, that are no less favorable than the carrier provides to itself, to its affiliates and to other third parties,”³⁸ because affiliates provide numerous benefits that non-affiliates do not. One and two way roaming arrangements should be viewed in the same manner. As Dr. Rosston has explained, one-way and two-way roaming deals “differ fundamentally”:

In a two-way deal, the firms act as both buyers and sellers at the same time. A firm that is buying roaming services from another carrier may get a much better deal if in addition it is also providing roaming services to the other company. When a firm is simply buying roaming services, it is not providing the additional benefits that come from a two-way deal, and it may need to pay a substantially higher roaming price to offset the lack of reciprocal benefits.³⁹

This point is confirmed by practices in the unregulated Internet industry, where backbone providers enter into “peering” arrangements with each other and sell “transit” services to smaller

³⁶ *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). In other words, “apples should be compared to apples.” *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989).

³⁷ *See, e.g., Digital Cellular Referral Order*, 20 FCC Rcd 8723 (2005).

³⁸ MetroPCS Comments at 15. *See also id.* at 24 (“[P]roviders should not be permitted to offer roaming agreements to affiliates with terms and conditions that differ from those offered to non-affiliates.”).

³⁹ Rosston Economic Analysis at ¶ 61, attached to Sprint Nextel’s Comments.

providers.⁴⁰ Dr. Rosston concludes from this practice: “The key lesson from the competitive Internet backbone interconnection is that because some firms have peering arrangements and other firms operate with transit does not necessarily imply a market failure. Likewise, the presence of many different types of roaming agreements is not a market failure or the result of anti-competitive exercise of market power.”⁴¹ Once again, because the benefits of two-way deals are fundamentally different from one-way deals, it is entirely reasonable for a carrier to use different prices under established Commission precedent.

The Commission has previously recognized that if roaming rules ever become necessary, “such a rule would need to recognize that not all carriers are similarly situated”:

Thus, such a rule need not require carriers to offer roaming agreements to all other carriers on the same terms and conditions, or even to offer roaming service to any carrier at all.⁴²

Sprint Nextel opposes the adoption of any new rules, for the many reasons discussed above. Nevertheless, if the Commission does adopt new rules, those rules must recognize that not all carriers are similarly situated and that reasonable distinctions do not violate law.

B. THE “PRICE CAP” RULES ADVOCATED BY SOME WOULD CONSTITUTE BAD PUBLIC POLICY AND HARM CONSUMER WELFARE

Adoption of the price cap rules advocated by some (*e.g.*, “lowest prevailing retail rate,” “most favored nation”) would also affirmatively harm consumer welfare, because a likely result

⁴⁰ See, *e.g.*, Michele Kende, *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32, at 4-6 (Sept. 2000). MetroPCS quotes from this paper for the proposition that regulation is needed when the negotiations are between two carriers of different sizes. See MetroPCS Comments at 7-8. The author of this Working Paper reached no such conclusion; to the contrary, he concluded that it was reasonable for large Internet backbones to offer a small provider transit rather than peering. See Working Paper No. 32 at 19-21.

⁴¹ Rosston Economic Analysis at ¶ 64.

⁴² *1996 Roaming Order*, 11 FCC Rcd 9475 ¶ 22.

would be an increase in prices paid by consumers for roaming. Dr. Rosston observes that such price regulation “would create perverse incentives and could lead to substantially higher prices for consumers”:⁴³

The result of such a rule could be a stagnant market with little investment, little innovation, and higher prices – all of which would harm consumers, especially consumers in rural areas.⁴⁴

Dr. Rosston explains, for example, that Southern’s “lowest prevailing retail rate” proposal would “reduce [carrier] incentives to lower retail prices,” which would harm all consumers.⁴⁵ But he further observes that this proposal would harm rural consumers in particular, as “firms would have a lower incentive to invest in rural areas because they could get access to other carriers’ networks at the same low urban rates.”⁴⁶

The “most favored nation” proposal advocated by RTG would also harm rural consumers. As a general matter, large and small carriers have a natural incentive to negotiate a favorable roaming agreement when their respective service areas do not overlap, because low prices enable each carrier to offer lower roaming prices to their customers. But as Dr. Rosston explains, under RTG’s “most favored nation” proposal, these carriers would instead have the incentive to increase their roaming prices so as to prevent their competitors from getting access to the same low rates, which would increase prices for rural consumers.⁴⁷

⁴³ Rosston Economic Analysis at ¶ 78, attached to Sprint Nextel’s Comments.

⁴⁴ Second Rosston Economic Analysis at ¶ 33, attached hereto.

⁴⁵ *See id.* at ¶ 37.

⁴⁶ *Id.* at ¶ 36.

⁴⁷ *See* Rosston Economic Analysis at ¶¶ 80-82, attached to Sprint Nextel’s Comments.

IV. THERE IS NO BASIS TO ADOPT NEW RULES FOR SPECIAL APPLICATIONS OR SPECTRUM BANDS

Most of the comments focus on roaming for voice services. A few commenters argue that special rules are required for particular applications (push-to-talk, data) or particular bands (the 2.5 GHz BRS/EBS band). Sprint Nextel below responds to these arguments.

A. THERE IS NO BASIS TO ADOPT NEW RULES FOR IDEN DISPATCH NETWORKS

Southern provides service in parts of four states, yet it advertises that its customers have “the option of using phone and 1-way text messaging outside the SouthernLINC Wireless footprint in over 90 cities across the US.”⁴⁸ Southern is able to offer this vast coverage notwithstanding the very limited footprint of its own network because it and Sprint Nextel have executed – without any government rules – a roaming agreement for Southern’s voice services.⁴⁹ Nevertheless, Southern contends there exists a “market failure” because the parties have been unable to reach a roaming agreement regarding dispatch services (*e.g.*, push-to-talk, “dispatch” or “walkie-talkie”) that are provided over an iDEN network separate from that used in providing conventional voice services.⁵⁰ Southern asserts that Sprint Nextel’s “denial” of dispatch roaming is the result of an “unreasonable and discriminatory roaming policy” because Sprint Nextel has dis-

⁴⁸ See southernlinc.com/telecommunications.asp.

⁴⁹ Southern agrees that carriers like Sprint Nextel should not be forced to roam on third-party networks (like Southern’s network). See Southern Comments at 6, 40, 46 and 48. Sprint Nextel therefore does not understand Southern’s repeated complaint that the parties’ agreement is “non-reciprocal.” See *id.* at 3 and 13.

⁵⁰ See Southern Comments at 3, 14-15. Southern also seeks data roaming. Sprint Nextel provides data services to its iDEN customers using its iDEN dispatch network, and giving Southern access to this network raises the numerous problems discussed in above. Data roaming, however, also raises additional issues, including network security concerns (because direct competitors must connect their respective network elements), issues of IP address overlap for both subscriber units and network elements, and even if connectivity can be achieved with appropriate security measures, discerning how each carrier’s network can reach the other’s data application servers.

patch roaming arrangements with Nextel Partners and several international carriers.⁵¹ Southern makes this accusation even though it acknowledges that the use of similar network technologies is “not always sufficient to make roaming technologically possible between two carriers.”⁵²

iDEN dispatch networks, as Southern is aware, were not originally designed to support roaming. Thus, while customers of Nextel Partners, Telus (Canada) and NII (Latin/South America) can use their dispatch services while traveling in areas served by Sprint Nextel’s dispatch network, they do not roam like customers roaming among CDMA, GSM or iDEN-based GSM networks. Rather, iDEN dispatch “roaming” works because the participating carriers essentially operate their respective dispatch networks as one network. As a result, a Nextel Partner dispatch customer can reach all of the dispatch customers served by Sprint Nextel, NII and Telus. Simply put, iDEN technology lacks the capability to allow customers access to one network without gaining access to other subscribers on other operator networks.

The “roaming-like” arrangement that Sprint Nextel and other iDEN carriers have implemented over their dispatch networks is costly and difficult to implement and maintain. For example, all carriers must coordinate when any one partner installs a new network element (such as a DAP, iHLR, MDG, HA or iDAC). Similarly, if NII, for example, wishes to activate users with new PTT numbers or additional IMSI ranges, it cannot activate the numbers until it coordinates this activity with its iDEN “roaming” partners (*e.g.*, all parties must make the identical modifications to their respective translation tables). If NII in this example fails to perform the necessary coordination, network alarms will be triggered throughout Sprint Nextel’s dispatch network (as well as the dispatch networks operated by Nextel Partners and Telus), and the potential exists for

⁵¹ *See id.* at 12-14 and 27.

⁵² *Id.* at 41.

mistakes made by one carrier to cause service interruptions on their “roaming” partners’ networks. Nevertheless, Sprint Nextel and its iDEN dispatch partners, none of which compete against each other in the same geographic markets, agreed to this complex, cumbersome arrangement because they concluded that the benefits to their respective customers would exceed the costs of implementing and maintaining the capability.

Sprint Nextel would not receive a similar benefit by entering into a similar arrangement with Southern. Southern brings little to the table because, Sprint Nextel – along with its iDEN dispatch partners -- already has coverage in much of Southern’s service area and Sprint Nextel has no desire to have its dispatch customers “roam” on Southern’s network.⁵³

Further, Sprint Nextel would incur considerable added implementation and ongoing operational costs, as would its other iDEN partners, because Southern – which competes directly with Sprint Nextel in certain southeast markets – would have to engage in the same close coordination that Sprint Nextel and its business partners engage in today. Moreover, as a practical matter, Sprint Nextel could not agree to permit Southern to access this “one dispatch network” arrangement without securing the approval of the other participating carriers, because they would be directly impacted as well if Southern joined the group.

There are other considerations important to Sprint-Nextel’s position relative to dispatch “roaming.” Under the “equivalent” arrangement that Southern seeks, Southern would learn of new network elements that Sprint Nextel installs and would have direct access to Sprint Nextel’s dispatch network and millions of dispatch customers. The Commission will certainly appreciate Sprint Nextel’s reluctance to provide such knowledge and such access to a direct competitor.

⁵³ As noted above, Southern agrees that one carrier (*e.g.*, Sprint Nextel) should not be required to roam on third-party networks (*e.g.*, Southern). *See* Southern Comments at 6, 40, 46 and 48.

Sprint Nextel takes pride in the fact that it has a robust and extensive dispatch network, after having invested billions of dollars towards enabling this capability. The breadth of push-to-talk capabilities and the number of push-to-talk users is a point of competition and investment in wireless marketplace.⁵⁴ Why should Southern gain access to a distinguishing feature that Sprint Nextel has developed through extensive investment, research and development?

B. IT IS PREMATURE TO CONSIDER ANY RULES FOR MOBILE DATA SERVICES

Some rule proponents urge adoption of new requirements for both mobile voice and mobile data services, although they do not discuss mobile data services separately from voice services. ACS Wireless (“ACS”), in contrast, recognizes that new rules are unnecessary for voice services because voice roaming is “now commonplace” and “widespread.”⁵⁵ It contends, however, that new rules are required for data services because data roaming agreements are “not as prevalent” as voice agreements.⁵⁶ According to ACS, this is due “in part to the failure of the market to create incentives for CMRS carriers who offer mobile data service to enter into automatic roaming agreements”:

Because market forces have failed to ensure that consumers have mobile wireless data services that are easily accessible at all locations, ACS requests that the Commission institute rules that will promote automatic mobile wireless data roaming throughout the United States.⁵⁷

Data roaming agreements are not prevalent at this point in time. This is not, however, due to a “failure of the market to create incentives” to enter into such agreements as ACS sug-

⁵⁴ For example, Cingular recently began marketing its own push-to-talk services, and Cingular claims it offers “the largest Push to Talk Network Coverage area in America.” See www.cingular.com/pushtotalk.

⁵⁵ ACS Wireless Comments at 1 and 5.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 1 and 2.

gests. Rather, this is due to the fact that most carriers are not prepared to execute and implement data roaming agreements, as their initial focus has been on developing and deploying advanced technologies such as EV-DO within their own respective networks. It makes no sense to do data roaming with other carriers if advanced data capabilities such as EV-DO are not widely deployed in one's own network.

Data roaming is possible only if participating carriers use the same protocols. The global CDMA industry finalized data roaming standards – the CDMA Packet Data Roaming Exchange (“CRX”) – only one year ago.⁵⁸ Carriers ordinarily roam with each other *via* third-party clearinghouse/gateway networks, and these vendors had to modify their systems to meet the new CRX standard. Sprint Nextel recently completed certification testing with one major clearinghouse and is currently testing CRX roaming with its first CDMA carrier. Certification testing with a second clearinghouse is scheduled and expected to commence shortly, after which Sprint Nextel will conduct a test with another CDMA carrier through this vendor. Once this preliminary testing is completed, Sprint Nextel will be in a position to execute and implement CRX data roaming agreements with other CDMA carriers.

Sprint Nextel takes exception to ACS' assertion that carriers “appear to lack the incentive to negotiate [data roaming] agreements” and are “not prepared, or willing, to take the proactive steps necessary to ensure widespread data connectivity.”⁵⁹ In fact, carriers have the same incentive to execute data roaming agreements that they do for voice roaming. After all, it makes no

⁵⁸ See CDMA Development Group Press Release, *CDMA2000 Packet Data Roaming Exchange Approved for Carrier Implementation* (Nov. 17, 2004), available at www.cdg.org/news/press/2004/nov17_04.asp.

⁵⁹ ACS Wireless Comments at 6 and 7.

sense to provide voice roaming to one's customers when traveling "off net," yet not provide that same customer with the data services with which he is accustomed of using.⁶⁰

Sprint Nextel submits there is no market failure concerning data roaming, and the company is confident that data roaming agreements will become more prevalent within the next year as roaming technology catches up with data network deployment. As U.S. Cellular observes, given the "infancy" and ongoing development of 2.5, 3, and 4 G technologies, it is "not possible [for the FCC] to resolve such issues now," and new data roaming rules applicable to advanced networks might only "result in litigation over every roaming arrangement."⁶¹

C. IT IS ALSO PREMATURE TO CONSIDER ROAMING RULES FOR SERVICES PROVIDED IN THE 2.5 GHZ BAND

NY3G Partnership asks the Commission to impose roaming obligations on 2.5 GHz licensees to the extent they "offer CMRS," as well as "additional roaming obligations" on such licensees that would not be imposed on other CMRS providers.⁶² NY3G says the new rules it seeks are necessary because it may "*possibly* [provide] CMRS" with the one 2.5 GHz license it holds and because there is "no evidence that market forces will ensure the proliferation of roaming agreements among EBS/BRS band CMRS carriers."⁶³ NY3G makes its request even though the Commission rejected the same request less than six months ago, ruling that it would be

⁶⁰ While Sprint Nextel believes that data services are the future of the wireless industry, the fact remains that such services today constitute "only a relatively small percentage of . . . revenues" and "relatively low levels of APRU." *Sprint/Nextel Merger Order*, 20 FCC Rcd 13967 at ¶ 42 (2005). Sprint Nextel is confident that data roaming arrangements will be implemented in the near future.

⁶¹ U.S. Cellular Comments at 13 and 15.

⁶² See NY3G Partnership Comments at 1.

⁶³ See *id.* at 2 and 4 (emphasis added).

“premature” to impose roaming obligations on 2.5 GHz licensees “given the nascency of broadband uses and the on-going transition process in the 2.5 GHz band.”⁶⁴

Of course, there is no market evidence concerning the use of the 2.5 GHz band for broadband services given, as NY3G acknowledges, “the nascent nature of the market for EBS/BRS band” in the provision of such services.⁶⁵ Indeed, NY3G recently announced a trial of one vendor’s “pre-WiMAX” technology that is scheduled to begin in “early 2006,”⁶⁶ yet it still does not know what services it will provide in the band.⁶⁷

The history of the CMRS industry demonstrates that carriers have economic incentives to negotiate roaming agreements where two carriers provide similar services using similar technologies in different geographic markets. NY3G does not present a reason why these same economic incentives will not apply equally in the provision of mobile broadband services – whether in the 2.5 GHz band or some other band.

⁶⁴ *Sprint Nextel Merger Order*, 20 FCC Rcd 13967 at ¶ 162 (2005). NY3G continues to claim that Sprint Nextel holds a “dominant” position in the band – even though the FCC has already rejected this assertion, noting that despite the merger, “substantial amounts of 2.5 GHz spectrum remain for other competitors,” competitors have access to “nearly 300 megahertz of spectrum in other bands,” and that “meaningful competition” already exists for mobile data services.” *Merger Order* at ¶¶ 151, 154 and 156.

⁶⁵ See NY3G Partnership Comments at 4.

⁶⁶ ADAPTIX Press Release, *NY3G Partnership and ADAPTIX Announce Mobile Broadband Deployment for New York City; Pre-WiMAX Trial in Manhattan to Commence in Early 2006* (Sept. 8, 2005), available at www.adaptix.com/news.asp. NY3G has a website (see www.ny3g.com) but it contains no information about when NY3G plans to provide commercial service to customers.

⁶⁷ See NY3G Partnership Comments at 2 (“NY3G expects to deploy facilities capable of providing a wide variety of services, including *possibly* CMRS and two-way, high-speed broadband services.”)(emphasis added).

The Commission has correctly concluded that it is premature to determine what precise services will be provided in the 2.5 GHz band.⁶⁸ Even if different 2.5 GHz licensees happen to provide similar services, there is no way of knowing at this time whether they would even use compatible technologies that might support roaming.⁶⁹ Given the nascent stage of the development of the 2.5 GHz band, there is no basis to impose at this time roaming requirements on licensees in the 2.5 GHz band.

V. CONCLUSION

The FCC should not promulgate new roaming rules. The record demonstrates that consumers throughout the nation, including in rural areas, have benefited by the Commission's reliance on market forces. For the foregoing reasons and those contained in its comments, Sprint Nextel respectfully requests that the Commission take actions consistent with the views stated above.

Respectfully submitted,

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⁶⁸ See *Sprint Nextel Merger Order* at ¶ 156.

⁶⁹ Sprint Nextel is investigating a wide range of technologies for the 2.5 GHz band. See TOTAL TELECOM, *Sprint Evaluating Several OFDM Technologies for “4G”* (Nov. 17, 2005).